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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 355

HAROLD A. MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1966. A petition for rehearing was denied on May 16, 1966. Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including July 15, 1966, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court's instructions to the jury were proper.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of Illinois on eleven counts of violating the Securities Act of 1933 (15 U.S.C. 77q(a)) and four counts of mail fraud (18 U.S.C. 1341). Petitioner was sentenced to concurrent five year terms of imprisonment on each of the Securities Act counts and suspended concurrent five year terms on the mail fraud counts, with probation to begin after service of the first part of the sentence. The court of appeals unanimously affirmed the convictions over petitioner's complaint that four of the instructions to the jury were erroneous (Pet. App.).

The evidence at trial showed that petitioner organized an Illinois corporation in January 1961 known as the Business and Professional Womens Holding Company (D. App. 55–56).[1] The purpose of the holding company was to buy the charter of an existing life insurance company or to form a new life insurance company which would issue policies exclusively to women at greatly reduced rates (D. App. 15–19, 22, 24–25, 55). Petitioner promoted the sale of stock in the holding company to get the necessary funds, using the mails and interstate travel for this purpose (D. App. 12, 14, 18–27, 30–31, 33, 39–41, 76).

Between October 1960 and May 1963, approximately 1,000,000 shares of the holding company's common stock were sold for about $259,000 (D. App. 46). During this period, petitioner was in complete control

[1] The record on appeal consists of the appellant's appendix below (D. App.) and the government appendix below (G. App.).

of the funds received from investors. At the end of the period, the total company assets consisted of $3,000 in cash and office furniture and equipment (D. App. 7). The balance of the funds had been dissipated, with petitioner directly benefiting in the amount of $119,098.79 in the form of salary, commissions, finder's fees, payments to Insurance Management Institute (owned by petitioner) and other disbursements for his personal use (D. App. 36, 46, 71; G. App. 2–3).

During the course of his sales activities, petitioner repeatedly represented to potential investors that the holding company had purchased a life insurance company and in some instances that it had an option to purchase a controlling interest in a life insurance company (D. App. 19, 22, 26, 35). Those representations were false (D. App. 8–10, 29–30). The holding company at no time possessed sufficient capital to purchase an existing company or to form a new company. Despite the fact that investment funds had been dissipated without purchase or formation of an insurance company, petitioner continued to advise potential investors that the insurance company was to begin business within a short time, that only a small amount of stock remained available and that only a small amount of additional capital would be needed (D. App. 18–27).

ARGUMENT

The instruction petitioner asserts was erroneous was as follows (D. App. 98):

> Under the Securities Act of 1933 and the Mail Fraud Statute, which laws of the United

> States the Defendant is charged in this indictment with violating, none of the investors need have been themselves deceived or defrauded by the Defendant or even have relied on the misrepresentations allegedly made to them. Under the law it is immaterial whether the alleged unlawful scheme is either successful or unsuccessful or that the Defendant received any benefits as a result of the alleged scheme. It is only necessary for the Government to prove that the Defendant devised a scheme with intent to defraud and made use of the mails in connection therewith as charged in the indictment.

While admitting that this is, in the abstract, a correct statement of the law,[2] petitioner argues that the instruction was erroneous on the facts of this case. He relies on *Coleman* v. *United States,* 167 F. 2d 837 (C.A. 5), where, in reversing on other grounds, the court held erroneous an instruction that use of the proceeds was immaterial. It did so on the theory that the instruction removed from consideration by the jury charges bearing on the defendant's good faith. However, in the circumstances of the present case, all that the instruction did was correctly to eliminate from the jury's deliberation the need affirmatively to find that the fraudulent scheme succeeded or that the defendant benefited from the scheme.

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[2] *E.g.*, *Adjmi* v. *United States*, 346 F. 2d 654, 657–658 (C.A. 5) certiorari denied, 382 U.S. 823; *Atkinson* v. *United States*, 344 F. 2d 97, 98 (C.A. 8), certiorari denied, 382 U.S. 867; *United States* v. *Shavin*, 287 F. 2d 647, 651–652 (C.A. 7); *Erwin* v. *United States*, 242 F. 2d 336 (C.A. 6).

In any event, there is no conflict between *Coleman* and the instant case. As the court of appeals noted, whatever the charge in the indictment concerning the success or failure of the scheme, the disposition of the proceeds of the scheme was material here only as it bore on petitioner's good faith (Pet. App. 13; *Erwin* v. *United States,* 242 F. 2d 336 (C.A. 6)). Consequently, as the court of appeals found, the painstaking instructions on good faith and fraudulent intent in the instant case were sufficient to make any possible error in the instruction harmless (Pet. App. 13).[3] Indeed, on the evidence here, if the jury interpreted the instruction as requiring them to disregard the evidence as to disposition of the proceeds, such inter-

[3] The instructions on fraudulent intent and good faith were indeed accurate, thorough and meticulous in the instant case (D. App. 90–91, 100–102, 104, 108). They included, among other things, the instruction that there must exist a joint operation of act and intent (D. App. 90); that good faith condones a misstatement and excuses the defendant (D. App. 100); that the defendant must have acted with the specific intent to defraud (D. App. 100); that the act must be done knowingly and not because of a mistake or inadvertance (D. App. 101); that the act must be done with evil motive or bad purpose (D. App. 101); that mere "dealing talk" not accompanied by an artifice to deceive does not constitute fraud (D. App. 102); that the defendant will be given the benefit of doubt where a transaction is capable of either an honest or dishonest construction (D. App. 101, 102); and that the evidence must be such as to satisfy the jury's minds of such fraud or fraudulent intent to the exclusion of any other reasonable theory (D. App. 104). The jury was properly instructed concerning reasonable doubt (D. App. 102). No instruction tendered by petitioner was refused. Considering the instructions as a whole, petitioner's suggestion that they withdrew from the jury the issue of specific intent to defraud (Pet. 8) borders on the frivolous.

pretation would have operated only to petitioner's benefit since there was clear evidence that petitioner had appropriated the proceeds for his personal use.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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